IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

Civil Action—No. 15714.

TALON, INC.,

Appellant,

v.

UNION SLIDE FASTENER, INC.,

Appellee.

UNION SLIDE FASTENER, INC.,

Appellant,

v.

TALON, INC.,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLANT, UNION SLIDE FASTENER, INC.

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REPLY BRIEF ON BEHALF OF APPELLANT, UNION SLIDE FASTENER, INC.

Talon's answering brief (yellow cover) is a shameless distortion of the record below. By the seductive use of italics (Talon answering brief, p. 2), it takes language used by Union (R. 1616) out of context and claims that Union admitted that it had full opportunity before the District Court to show damage resulting to it from the actions of Talon. Having thus distorted the record, Talon then argues that the District Court's failure to admit evidence or permit a new trial to show damage to Union (R. 1128-1132) resulting from Talon's violations of the anti-trust laws is not a proper issue for appeal.

While Talon's argument relies exclusively on what it chooses to style an "admission" by Union, actually there is not a shred of fact in support of Talon's position. The record is clear: in response to Union's offers of proof on

the matters not admitted into evidence, the Court concluded as follows (R. 1129):

> ". . . there is no causal connection shown, nor can any be shown, between what the loss is on the books for each fiscal year and any activities of the plaintiff in this action. . . ."

And, in response to Union's request for an opportunity to present some law on the issue, the Court answered:

> "No, I am not going to permit you to do that. I have taken some proof on attorney's fees and expenses, and time . . . these other matters are pure speculation. It is highly speculative. From the facts of this case I can't see how loss would be sustained by virtue of quota agreements entered with other manufacturers."

A dialogue between the Court and Union's counsel followed wherein the Court asked:

> "Where is there any causal connection, proximate causal connection between these alleged loss of earnings of the defendant and any acts of the plaintiff?"

Mr. Mockabee answered:

> "The filing of the suit and the requirement that the defendant withdraw a very considerable percentage of his working capital for the defense of this suit."

As the District Court itself found, the suit against Union was part of a pattern of many suits brought by Talon against various defendants on invalid patents, where forced settlements resulted in quota agreements. As in all antitrust situations the individual acts must be considered in the light of the whole, including, *inter alia,* the introduction of the less-than-cost Wilzip and Falcon zippers, the sudden economic pressure exerted against Union after the commencement of this litigation (R. 1623-1632), and the unex-

plained fire and theft at Union's premises (R. 1625). Talon's reckless legal action against Union is only the most recent link in its chain of activities to restrain trade. Union was all but put out of business by Talon's plan, as would have been clear from the record had the District Court not erred in refusing to allow evidence of the extent of Union's losses.

The Fact of Damage and Proof of Recovery.

Talon's answering brief makes much of an artificial distinction between the *fact* of damage and the *amount* of damage. This is distinction without a difference; how can a litigant establish the fact of damage apart from introducing evidence of such damage? Necessarily the same piece of such evidence has two inferences—

1. that Union has *in fact* been damaged, and

2. that Union has in fact been damaged *in a particular amount and to a particular extent.*

If by the *fact* of damage, Talon refers to a causal connection, one fails to see how a showing of causation can be made where a litigant cannot introduce evidence of damage. Certainly there is no rule that causation in the abstract must first be proved!

The criteria for recovery in treble damage anti-trust actions are well known; recovery is permissible where the claimant proves:

1. That the respondent has engaged in acts unlawful under the anti-trust laws;

2. That the claimant has had lower earnings than the earnings of:

   a. his own prior record

   b. a normal year

   c. a comparable competitor

3. That the acts of defendants are the preponderant, dominant or substantial or, among the known factors, the most substantial factor in causing the loss.

4. Segregation and measurement of the causes of loss are impossible.

Mormand v. *Universal Film Exchange,* 72 F. Supp. 469, affirmed, 172 F. 2d 37 (1st Cir.) 6 F. R. D. 409, 421, citing *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 265, 66 S. Ct. 574; Restatement, Torts, Sec. 431; Prosser, Torts, pp. 322-324; Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 149; Green, Rationale of Proximate Cause, 132-141.

It is submitted that Talon's artificial distinctions should not cloud the fact that Union was improperly deprived of the opportunity to present proof from which a causal connection could be inferred.

The Cases Cited by Talon Do Not Support Their Position.

In its opening brief, Union has cited the case of *Kobe* v. *Dempsey Pump Co. et al.,* 198 F. 2d 416 (10th Cir. 1952) in support of the proposition that Talon's baseless litigation against Union is part of its illegal plan causing damage to Union. The Talon answering brief, consistent in its pattern of distortion, tears the language of the *Kobe* case out of context and concludes:

> "... it was the use of the fact that a lawsuit had been filed that damaged Dempsey, not the lawsuit itself. In this case, there was no circularizing of the trade or similar activities calculated to deprive Union of business." (Talon answering brief P. 13).

The record speaks of comparable pressures exerted against Union after the commencement of this litigation (R. 1623-1625), but Talon apparently chooses to miss the point of the *Kobe* case. On page 14 of its answering brief, Talon quotes out of context:

> "We have no doubt that if there was nothing more than the bringing of the infringement action, resulting damages could not be recovered, but that is not the case."

But, what Talon has quoted is only a part of a paragraph and is artfully silent about the fact that the Court went on to say:

> "The facts as hereinbefore detailed are sufficient to support a finding that although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor. *The infringement action and the related activities, of course, in themselves were not unlawful,* and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them we think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme." (P. 425).*

A most important element in the Court's findings of monopolistic practices in the *Kobe* case was the sequence of patent pooling contracts:

> "We think the evidence warrants the finding that the first Kobe-Rodless agreement and the creation of Roko was the beginning of an arrangement to corner the hydraulic pump business for oil wells and that it had that result. The record indicates that every important patent which was issued relating to this field of the industry, although never used, found its way into that pool and no other such pump was manufactured by anyone else but Kobe, old or new, until Dempsey put one on the market in 1948." (P. 423).

Talon's presentation of the *Kobe* case is more than misleading; it is a wilful deception.

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* Emphasis is ours, except where stated to the contrary.

Talon seeks support in *Hunter Douglas Corporation* v. *Lando Products* (235 F. 2nd 631), an interesting case but not in point. In the *Hunter* case, this Court held that the claimant failed to prove the tie-in sales which were alleged as well as failing to prove that such sales had adversely affected the claimant's business. Here, Talon's monopolistic acts were certainly proved to the satisfaction of the District Court. The present failure to prove damage resulted from the District Court's ruling that evidence of such damage was somehow inadmissible, which is really at the heart of the matter.

To complete its masterpiece of irresponsibility, Talon cites *Flintkote* v. *Lysfjord,* 246 F. 2nd 368 (9th Cir. 1957), which if properly quoted says:

> "The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words the *fact* of injury must first be shown before the jury is allowed to estimate the amount of damage." (P. 392)

Then quoting from the United States Supreme Court in *Story Parchment Company* v. *Patterson Parchment Paper Co.* (282 U. S. 555), this Court continued:

> "It is true that there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that plaintiff sustained some damage, and the measure of proof necessary to enable a jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of this amount."

This does not have the remotest bearing to the present case where the District Court refused to *admit evidence* on the *fact and amount* of damage.

Conclusion.

Talon's answering brief is even further proof of the lengths it is willing to go in maintaining its illegal structure. Union should be provided an opportunity to present its case in full and to explain its right to damages for Talon's illegal acts.

Respectfully submitted,

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